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No.

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an alien found removable because of his criminal conviction for an aggravated felony (a drug trafficking crime), applied for discretionary relief from removal. The Board of Immigration Appeals (BIA) concluded that he was ineligible for discretionary relief under 8 U.S.C. 1182(c) (1994) because that provision had been repealed. Respondent filed a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241, contending that Congress's repeal of Section 1182(c) did not apply to his conviction, which was entered before Section 1182(c) was repealed, even though his removal proceedings were commenced after the repeal became effective. The lower courts agreed and granted habeas corpus.

The questions presented are:

1. Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

2. Whether the BIA properly concluded that respondent is not eligible for discretionary relief under Section 1182(c) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
1. Statutory background	2
a. Pre-AEDPA law	2
b. AEDPA	3
c. IIRIRA	7
2. Proceedings below	9
Reasons for granting the petition	17
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Adenji v. *Perryman*, No. 00-5375 (Oct. 30, 2000)	6
Alanis-Bustamante v. *Reno*, 201 F.3d 1303 (11th Cir. 2000)	20
Alfarache v. *Cravener*, 121 S. Ct. 46 (2000)	6
Bowrin v. *INS*, 194 F.3d 483 (4th Cir. 1999)	5
Bugajewitz v. *Adams*, 228 U.S. 585 (1913)	28
Calcano-Martinez v. *Reno*, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000)	10
Chevron U.S.A. Inc. v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984)	17, 28
De Horta-Garcia v. *United States*, 121 S. Ct. 82 (2000)	6
DeSousa v. *Reno*, 190 F.3d 175 (3d Cir. 1999)	6
Felker v. *Turpin*, 518 U.S. 651 (1996)	12
Finlay v. *INS*, 210 F.3d 556 (5th Cir. 2000)	20
Flores-Miramontes v. *INS*, 212 F.2d 1133 (9th Cir. 2000)	19

Cases—Continued: Page

Foti v. *INS*, 375 U.S. 217 (1963) 21, 23
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) 3
Galindo-Del Valle v. *Attorney General*, 213 F.3d 594 (11th Cir. 2000), petition for cert. pending, No. 00-362 29
Galvan v. *Press*, 347 U.S. 522 (1954) 28
Garnica-Vasquez v. *Reno*, 210 F.3d 558 (5th Cir. 2000) 20
Goncalves v. *Reno*, 144 F.3d 110 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999) 5, 6
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 28
Heikkila v. *Barber*, 345 U.S. 229 (1953) 21
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999) 5, 6
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 28
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 27
INS v. *Yang*, 519 U.S. 26 (1996) 26
Jay v. *Boyd*, 351 U.S. 345 (1956) 26
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000) 5, 6
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 120 S. Ct. 1157 (2000) 5, 6
Landgraf v. *USI Film Products*, 511 U.S. 244 (1994) 15
Lechuga v. *Perryman*, 121 S. Ct. 299 (2000) 6
Liang v. *INS*, 206 F.3d 308 (3d Cir. 2000) 19
Mahadeo v. *Reno*, 226 F.3d 3 (1st Cir. 2000) 19
Mahler v. *Eby*, 264 U.S. 32 (1924) 28
Magana-Pizano v. *INS*, 200 F.3d 603 (9th Cir. 1999) 5
Marcello v. *Bonds*, 349 U.S. 302 (1955) 28
Mattis v. *Reno*, 212 F.3d 31 (1st Cir. 2000) 5
Max-George v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280 19

Cases—Continued: Page

Mayers v. *INS*, 175 F.3d 1289 (11th Cir. 1999) 5
Morales-Ramirez v. *Reno*, 209 F.3d 977 (7th Cir. 2000) 28
Pak v. *Reno*, 196 F.3d 666 (6th Cir. 1999) 5
Perez v. *Reno*, 227 F.3d 294 (5th Cir. 2000) 20
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 12, 22, 27
Requena-Rodriguez v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999) 5, 6
Richardson v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000) 20
Russell v. *Reno*, 216 F.3d 1091 (11th Cir. 2000), petition for cert. pending, No. 00-5970 20
Sandoval v. *Reno*, 166 F.3d 225 (3d Cir. 1999) 5
Shah v. *Reno*, 184 F.3d 719 (8th Cir. 1999) 5
Shaughnessy v. *Pedreiro*, 349 U.S. 48 (1955) 21
Smith v. *Reno*, 121 S. Ct. 81 (2000) 6
Soriano, In re, Interim Dec. No. 3289, 1996 WL 426888 (A.G. Feb. 21, 1997) 4
Stone v. *INS*, 514 U.S. 386 (1995) 21, 24
Tasios v. *Reno*, 204 F.3d 544 (4th Cir. 2000) 5
Turkhan v. *Perryman*, 188 F.3d 814 (7th Cir. 1999) 6
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 22
United States v. *Fausto*, 484 U.S. 439 (1987) 22
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 (1868) 12

Constitution, statutes and regulation:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension Clause) 2, 25, 26, 98a
Amend. V (Due Process Clause) 16
Act of Oct. 11, 1996, § 2, 110 Stat. 3657 8
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2
§ 401(e), 110 Stat. 1268 ..... 2, 4, 21, 24, 110a

Statutes and regulation—Continued: Page

§ 440, 110 Stat. 1276 ..... 2, 4, 110a
§ 440(a), 110 Stat. 1276 4
§ 440(d), 110 Stat. 1277 ..... 3, 5, 6, 29
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998) 3, 21
Illegal Immigration Reform and Immigrant Responsibility Act of 1966, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 2, 110a
§§ 301-308, 110 Stat. 3009-575 14
§ 304, 110 Stat. 3009-575 ..... *passim*
§ 304(b), 110 Stat. 3009-597 ..... 2, 10, 112a
§ 306, 110 Stat. 3009-607 8
§ 306(b), 110 Stat. 3009-612 8
§ 308(b)(6), 110 Stat. 3009-615 7
§ 309, 110 Stat. 3009-625 ..... 2, 112a
§ 309(a), 110 Stat. 3009-625 ..... 8, 14, 15, 27
§ 309(c), 110 Stat. 3009-625 8
§ 321, 110 Stat. 3009-627 15
§ 322, 110 Stat. 3009-628 15
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* (1994 & Supp. IV 1998):
8 U.S.C. 1101(a)(43) 3
8 U.S.C. 1101(a)(43)(B) 9
8 U.S.C. 1103(a)(1) (Supp. IV 1998) 28
8 U.S.C. 1105a (1994) 8
8 U.S.C. 1105a(a) (1994) 2, 3, 21, 98a, 99a
8 U.S.C. 1105a(a)(10) (1994) 3, 4, 8, 22, 24
8 U.S.C. 1182(c) (1994) ..... *passim*
8 U.S.C. 1225(b) (Supp. IV 1998) 2, 101a
8 U.S.C. 1225(b)(1) (Supp. IV 1998) 7, 22
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) 4
8 U.S.C. 1228(b) (Supp. IV 1998) 7
8 U.S.C. 1229 (Supp. IV 1998) 7
8 U.S.C. 1229a (Supp. IV 1998) 7
8 U.S.C. 1229b (Supp. IV 1998) 7, 10

Statutes and regulation—Continued: Page

8 U.S.C. 1229b(a) (Supp. IV 1998) 2, 105a
8 U.S.C. 1229b(a)(3) (Supp. IV 1998) 7
8 U.S.C. 1229b(b)(1)(C) (Supp. IV 1998) 7
8 U.S.C. 1251(a)(2)(A)(iii) (1994) 4
8 U.S.C. 1252 (Supp. IV 1998) 2, 8, 9, 22, 23, 25, 105a
8 U.S.C. 1252(a)(1) (Supp. IV 1998) 8, 21, 22, 25
8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) 8, 11, 12, 13, 19, 23, 25
8 U.S.C. 1252(b)(1) (Supp. IV 1998) 22, 24
8 U.S.C. 1252(b)(6) (Supp. IV 1998) 24
8 U.S.C. 1252(b)(9) (Supp. IV 1998) 8, 12, 22, 25
8 U.S.C. 1252(e)(2) (Supp. IV 1998) 7, 22
8 U.S.C. 1252b (1994) 7
28 U.S.C. 2241 (1994 & Supp. IV 1998) ..... *passim*
8 C.F.R. 3.14(a) 9

Miscellaneous:

65 Fed. Reg. 44,478 (2000) 6
H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) 21

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-39a)[1] is not yet reported. The opinion and judgment of the district court (App. 74a-93a) are reported at 64 F. Supp. 2d 47. The decisions of the Board of Immigration Appeals (App. 94a-95a) and the immigration judge (App. 96a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the separately bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 98a-114a) are pertinent provisions of the Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Sections 1105a(a) and 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1225(b), 1229b(a), and 1252 of Title 8, as in effect beginning April 1, 1997; Sections 401(e) and 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276 (enacted Apr. 24, 1996); Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, 3009-625 (enacted Sept. 30, 1996); and Section 2241 of Title 28, United States Code.

STATEMENT

1. ***Statutory Background.***

This case presents questions about the application and, potentially, the constitutionality of several major changes to the Nation's immigration laws enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. *Pre-AEDPA Law.* Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could

apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) (see 8 U.S.C. 1101(a)(43) (1994)), he had not served a term of imprisonment of five years or longer for that conviction. See 8 U.S.C. 1182(c) (1994).[2] If the Attorney General, in the exercise of her discretion, denied relief from deportation, then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. *AEDPA.* In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section—including aliens who were deportable because they had been convicted of aggra-

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[2] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, the Second Circuit held in *Francis* v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country must also be given the opportunity to apply for relief from deportation under Section 1182(c). The Attorney General acquiesced in that decision.

vated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998))).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1276-1277 (adding a new 8 U.S.C. 1105a(a)(10)). At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that the bar to granting discretionary relief under 8 U.S.C. 1182(c) (1994) that was enacted in AEDPA Section 440(d) applied to all deportation proceedings pending on the date of AEDPA's enactment, including those in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241 to review their deportation orders. The courts of appeals divided as to whether the district courts retained habeas corpus jurisdiction to entertain such challenges to final orders of deportation, or whether (as the government contended) AEDPA had deprived the district courts of such jurisdiction and instead provided that, to the extent any judicial review of deportation orders might remain available for aliens convicted of aggravated felonies, the courts of appeals had exclusive

authority to entertain such challenges.[3] The courts of appeals also reached varying conclusions about the temporal scope of AEDPA Section 440(d).[4]

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[3] The majority of the circuits concluded that, after AEDPA, the district courts retained habeas corpus jurisdiction to entertain statutory and constitutional challenges to deportation orders against criminal aliens. See *Goncalves* v. *Reno*, 144 F.3d 110, 118-126 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Henderson* v. *INS*, 157 F.3d 106, 118-122 (2d Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 229-238 (3d Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483, 486-489 (4th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999); *Pak* v. *Reno*, 196 F.3d 666, 670-673 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722-724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 607-609 (9th Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1142-1147 (10th Cir. 1999), cert. denied, 120 S. Ct. 1539 (2000); *Mayers* v. *INS*, 175 F.3d 1289, 1295-1300 (11th Cir. 1999). The Seventh Circuit, by contrast, concluded that AEDPA barred district courts from exercising that jurisdiction. See *LaGuerre* v. *Reno*, 164 F.3d 1035, 1040-1041 (1998), cert. denied, 120 S. Ct. 1157 (2000).

[4] The First, Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits concluded that AEDPA Section 440(d) did not bar relief under 8 U.S.C. 1182(c) (1994) for aliens whose deportation proceedings were commenced before AEDPA was enacted. See *Goncalves*, 144 F.3d at 126-133; *Henderson*, 157 F.3d at 129-130; *Sandoval*, 166 F.3d at 241; *Pak*, 196 F.3d at 675-676; *Shah*, 184 F.3d at 724; *Magana-Pizano*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301-1304. The Fourth Circuit held that AEDPA Section 440(d) did not bar relief for an alien who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted, even if that alien was placed in deportation proceedings after AEDPA's enactment. See *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000). The Second Circuit agreed with that conclusion in the decision below in this case. App. 31a-32a. The First and Ninth Circuits held that, although AEDPA Section 440(d) generally barred relief for aliens convicted before AEDPA was enacted but placed in proceedings after its enactment, it would not bar relief if an alien could show that he pleaded guilty in specific reliance on the fact that, under the state of the law before AEDPA was enacted, he might have been eligible for relief under Section 1182(c). See *Mattis* v. *Reno*, 212 F.3d 31, 37 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. The Third, Fifth, and Tenth Circuits, by

The government and several aliens filed petitions for a writ of certiorari, asking this Court to decide whether the district courts retained habeas corpus jurisdiction after AEDPA to entertain challenges to deportation orders and to resolve the temporal reach of AEDPA Section 440(d). In the interim, however, Congress had enacted another sweeping change to the INA, in IIRIRA. The IIRIRA carried forward and recast from AEDPA the preclusion of judicial review in cases involving aggravated felons and also refashioned the statutory scheme governing discretionary relief, including the bar to relief for aggravated felons. Accordingly, this Court denied review of the petitions raising issues arising only under AEDPA, remitting to a later date related issues in cases arising under IIRIRA.[5] This is such a case.

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contrast, held that AEDPA Section 440(d) did bar relief for aliens who were convicted before AEDPA was enacted but were placed in deportation proceedings after its enactment. *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 307-308; *Jurado-Gutierrez*, 190 F.3d at 1149-1152. And the Seventh Circuit held that AEDPA Section 440(d) barred relief even for aliens who were already in deportation proceedings when AEDPA was enacted. *Turkhan* v. *Perryman*, 188 F.3d 814, 827 (7th Cir. 1999); *LaGuerre*, 164 F.3d at 1040-1041.

In light of that conflict in the circuits, as well as this Court's denial of certiorari in several cases presenting the temporal scope of AEDPA Section 440(d), the Attorney General recently issued for notice and comment a proposed rule that would acquiesce in the decisions of those circuits that have concluded that AEDPA Section 440(d) does not bar relief for an alien who was placed in deportation proceedings before AEDPA was enacted. See 65 Fed. Reg. 44,478 (2000). The Attorney General would still apply AEDPA Section 440(d), however, absent adverse circuit precedent, to aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment. *Ibid.*

[5] See *Adeniji* v. *Perryman*, No. 00-5375 (Oct. 30, 2000); *Lechuga* v. *Perryman*, 121 S. Ct. 299 (2000); *Alfárache* v. *Cravener*, 121 S. Ct. 46 (2000); *Smith* v. *Reno*, 121 S. Ct. 81 (2000); *De Horta-Garcia* v. *United States*, 121 S. Ct. 82 (2000); *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000); *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000); *Reno* v. *Navas*, 526 U.S. 1004 (1999); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999).

c. *IIRIRA.* On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders,[6] and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. IV 1998); 110 Stat. 3009-587 to 3009-593.[7] As before, an alien convicted of an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998).

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. As under AEDPA, Congress provided that aliens convicted of aggravated felonies are ineligible for discretionary relief. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transitional rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new

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[6] IIRIRA also expressly repealed the old INA provisions setting forth the administrative procedures for deportation of aliens. See IIRIRA § 308(b)(6), 110 Stat. 3009-615 (striking old 8 U.S.C. 1252b (1994)).

[7] Congress also enacted special forms of removal proceedings for aliens arriving in the United States without valid documentation, see 8 U.S.C. 1225(b)(1) (Supp. IV 1998), and for aliens not admitted for legal permanent residence who are convicted of aggravated felonies, see 8 U.S.C. 1228(b) (Supp. IV 1998). Congress provided for limited habeas corpus review in the district courts of immigration officers' removal decisions under Section 1225(b)(1). See 8 U.S.C. 1252(e)(2) (Supp. IV 1998); see also pp. 21-22, *infra*.

provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. In its stead, Congress enacted the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including an aggravated felony. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. ***Proceedings Below.***

a. Respondent is a native and citizen of Haiti who was admitted to the United States as a lawful permanent resident on June 17, 1986. On March 8, 1996, before the enactment of AEDPA and IIRIRA, respondent pleaded guilty in Connecticut state court to the sale of a controlled substance. App. 3a. Under the INA, that offense constituted "illicit trafficking in a controlled substance," and was therefore an aggravated felony. See 8 U.S.C. 1101(a)(43)(B).

In 1997, after IIRIRA took effect, the Immigration and Naturalization Service (INS) commenced removal proceedings against respondent, charging him with removability based on his drug offense.[8] At his hearing before an immigration judge (IJ), respondent sought to apply for relief from deportation under former 8 U.S.C. 1182(c) (1994), which had been repealed as of April 1, 1997 (see pp. 7-8, *supra*). The IJ denied that application and ordered respondent removed to Haiti. App. 96a-97a. The BIA affirmed, concluding that respondent was not eligible for Section 1182(c) relief because that form of relief "is not available in removal proceedings,

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[8] The district court noted that the INS issued the Notice to Appear on April 10, 1997, served that Notice on respondent on July 10, 1997, and filed the Notice with the immigration court on July 23, 1997. App. 78a. The Attorney General's regulations provide that a removal proceeding is commenced when a charging document such as the Notice to Appear is filed with the immigration court by the INS. 8 C.F.R. 3.14(a). In any event, all three dates followed the full effective date of IIRIRA, and so respondent's proceeding was plainly commenced after IIRIRA took effect.

which respondent is properly in. Section [1182(c)] was repealed by section 304(b) of [IIRIRA] * * * and was replaced with cancellation of removal under * * * 8 U.S.C. § 1229b. The respondent is statutorily ineligible for cancellation of removal as his criminal conviction constitutes an aggravated felony." App. 95a.

b. Respondent then filed a petition for a writ of habeas corpus in district court. Respondent contended that, notwithstanding the repeal of the former Section 1182(c) and the fact that he was placed in removal proceedings under the new provisions of IIRIRA, rather than in deportation proceedings under the pre-IIRIRA provisions of the INA, he remains eligible to be considered for discretionary relief under Section 1182(c), and that the repeal of that provision was not to be applied "retroactively" to his case, which involves a criminal conviction entered before IIRIRA took effect. The government argued that the district court lacked habeas corpus jurisdiction to review the final order of removal, and in the alternative defended on the merits the BIA's decision holding respondent ineligible for relief under former Section 1182(c). The district court held that it had jurisdiction, ruled against the government on the merits, and granted habeas corpus, directing the BIA to entertain respondent's application for relief under the repealed Section 1182(c). App. 74a-93a.

c. The court of appeals affirmed. App. 1a-39a.

(i) The court first concluded (App. 5a-6a), based on its decision issued the same day in *Calcano-Martinez* v. *Reno*, Nos. 98-4033 et al., 2000 WL 1336611 (see App. 40a-73a), that the district court properly exercised jurisdiction over respondent's habeas corpus petition. As the court in this case summarized its holding in *Calcano*, IIRIRA did not "divest [the district] courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judi-

cial review is available." App. 6a. Here, the court continued, no other avenue of judicial review existed because respondent was convicted of an aggravated felony and was therefore barred by 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) from raising his claims by petition for review in the court of appeals. *Ibid.*

In *Calcano*, the same panel of the court of appeals ruled that, because of Section 1252(a)(2)(C), it lacked jurisdiction over direct petitions for review filed by three aliens, also convicted of aggravated felonies and found ineligible by the BIA for discretionary relief on that basis, raising the same retroactivity claim raised by respondent in this case. App. 48a-73a. The court followed prior decisions (see App. 48a-54a) holding that the courts of appeals were barred from considering any claims raised in direct petitions for review for review filed by aggravated felons, except to the extent that such petitions directly challenged the BIA's conclusion that the alien was removable because of an aggravated felony conviction, since that question determined whether the preclusion of removal in Section 1252(a)(2)(C) applies. See p. 12, *infra*.[9] But the court further held that the district courts retained habeas corpus jurisdiction to consider claims that are "purely legal in nature," including "constitutional challenges and claims that the Attorney General misinterpreted the immigration laws." App. 54a.

The court of appeals acknowledged in *Calcano* that the Fifth and Eleventh Circuits have held that Congress has "eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings." App. 57a. The court aligned itself (App. 59a-61a), however, with the Third and Ninth Circuits, which have ruled that "Article III courts

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[9] Respondent does not raise any such claim in this case: he does not contest that he is an alien, that he was properly found by the IJ and the BIA to be removable, and that the offense for which he was found removable was properly classified as an aggravated felony.

continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders," App. 60a, and that it is therefore unnecessary to read any exceptions into Section 1252(a)(2)(C), which "bars [the courts of appeals'] jurisdiction over petitions to review removal orders against aliens convicted of certain crimes," App. 61a.

In addition, the court in *Calcano* read this Court's decisions in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), to hold that "a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name," App. 61a, and more particularly that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it," App. 62a. The court found "nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." App. 62a.[10] And, it stated, the contrary interpretation would "raise a serious constitutional question under the Suspension Clause," App. 68a, for it would leave respon-

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[10] In particular, the court rejected (App. 64a-68a) the government's reliance on Section 1252(b)(9), which expressly requires that judicial review of all legal and factual challenges to a removal decision be available only in the courts of appeals on review of a final removal order. The court acknowledged that this Court in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471 (1999), characterized Section 1252(b)(9) as an "'unmistakable zipper clause' that channels judicial review of all immigration-related decisions and actions to the court of appeals," App. 65a (quoting *AADC*, 525 U.S. at 483), but it suggested that Congress enacted Section 1252(b)(9) only for the purpose of "consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals," App. 66a, and not to foreclose any other avenue by which an alien might challenge his removal order, such as a collateral attack in district court by habeas corpus petition.

dent without a judicial forum for his challenge to the BIA's determination that it may not grant him relief under the repealed Section 1182(c).

Calcano also rejected the government's argument that, even if the district courts could not review the merits of final removal orders by habeas corpus, the courts of appeals would retain sufficient authority to review final removal orders, on direct petitions for review, to satisfy the Constitution. App. 68a-69a. The government had submitted that, on petition for review, a court of appeals retains authority to entertain substantial constitutional claims, such as constitutional challenges to the INA itself, as well as challenges going to "jurisdictional facts," such as whether the petitioner "is an alien who is removable by reason of having committed a specified criminal offense," and who therefore falls within the preclusion of review in Section 1252(a)(2)(C). App. 68a. Even assuming that such review remains available in the court of appeals, the court believed that it would be insufficient to satisfy the Constitution, for, it stated, "review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law." App. 71a.

The *Calcano* panel noted finally that, "if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review," for such a scheme "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review." App. 72a. But, the court stated (App. 72a-73a), "[a]lthough this interpretation may represent sound legislative policy, * * * we do not read IIRIRA or our prior cases to permit such review under" Section 1252(a)(2)(C).

(ii) On the merits, the court of appeals held (App. 6a-32a) that the repeal of Section 1182(c) by IIRIRA Section 304 could not be applied to an alien who pleaded guilty or nolo contendere to an aggravated felony before IIRIRA's enactment. In reaching that conclusion, the court purported to apply (App. 13a) the two-step analysis set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), for determining whether a federal statute applies to pre-enactment conduct:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

App. 13a.

The court first concluded, under the first prong of *Landgraf*, that Congress had not made clear whether the repeal of Section 1182(c) by IIRIRA Section 304 was to be applied to aliens who were convicted before Section 304's effective date. App. 14a-22a. It rejected the government's argument that, under the general "effective date" provision in IIRIRA Section 309(a), 110 Stat. 3009-625, all of the new rules added by Sections 301-308 of IIRIRA, including IIRIRA Section 304's repeal of Section 1182(c) and its substitution of cancellation of removal, must be applied together to aliens placed in removal proceedings on or after April 1, 1997. The

court found that submission contrary to this Court's statement in *Landgraf* (511 U.S. at 257) that an "effective date" provision does not dictate a statute's application to pre-enactment conduct. App. 16a. Although the court acknowledged that IIRIRA Section 309(a) is "arguably more direct than a typical effective date provision," it concluded that Section 309(a) "is not precise enough to mandate retroactive application of IIRIRA § 304 under the first step of the *Landgraf* inquiry." *Ibid.*[11]

The court then concluded, under the second step of the *Landgraf* analysis, that applying Section 304 in the cases of aliens who pleaded guilty before IIRIRA was enacted would have "an impermissible retroactive effect." App. 25a. Focusing on "the decision to enter a guilty plea to a crime * * * that qualifies the alien for removal under the immigration laws," the court agreed with respondent that "an alien charged with a crime making him eligible for deportation would factor the immigration consequences of conviction"—including "the availability of discretionary relief from removal"—"in deciding whether to plead or proceed to trial." App. 26a-27a (brackets and internal quotation

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[11] The court also contrasted (App. 17a-18a) Section 304 with other provisions in a different subtitle of IIRIRA (especially Sections 321 and 322), where Congress had expressly provided that the amendments were to be applied to convictions entered before the statute's enactment. The court rejected, however, respondent's contention that those other provisions' express directives required the court to conclude by negative inference that Section 304 applies only to post-enactment conduct. Those other provisions, the court stated, were "too dissimilar to the availability of discretionary relief to support a negative inference in favor of prospective application of IIRIRA § 304." App. 21a n.5. In addition, the court stated, although the effective date provision in IIRIRA Section 309(a) did not dictate Section 304's application to pre-enactment conduct, it did "render [c]ongressional intent ambiguous." *Ibid.* Thus, the court "decline[d] to infer from this lack of guidance that Congress intended IIRIRA § 304 to apply only prospectively and [held] that Congress's intent as to the section's temporal reach is ambiguous." *Ibid.*

marks omitted). The court further remarked that, before AEDPA and IIRIRA were enacted, "an alien's reliance on the possibility of receiving a waiver of deportation was reasonable because there was a strong possibility that he or she would receive relief." App. 28a. Thus, the court maintained, under pre-AEDPA and pre-IIRIRA law, an alien charged with a deportable crime would "only decide to concede guilt to a crime that renders him or her removable in order to be eligible to apply for relief from removal," whereas "[u]nder the law today, this settled expectation is upset dramatically." App. 29a. Because Section 304 of IIRIRA, in the court's view, would "upset settled expectations were it applied retroactively to pre-enactment guilty pleas [and] * * * would attach new legal consequences to [an alien's] guilty plea to a removal crime," it would "have an impermissible retroactive effect" in such cases. *Ibid.*[12]

(iii) Judge Walker dissented from the court's ruling on the merits, and concluded that Congress had expressly prescribed that all of IIRIRA Section 304, including its repeal of Section 1182(c), is to be applied in any removal proceeding commenced after IIRIRA's general effective date of April 1, 1997. App. 33a-39a. He noted that such application raises no constitutional concern, for "Congress may effect such changes to require removal of an alien who would not have been subject to removal before the changes became effec-

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[12] Although the court did not expressly conclude that such application would be unconstitutional, it did invoke a perceived need to avoid placing IIRIRA Section 304 in constitutional doubt. App. 22a n.6. The court acknowledged that the Due Process Clause of the Fifth Amendment places only "a narrow limit on Congress's power" to enact retrospective legislation, but, it stated, application of IIRIRA Section 304 to aliens convicted on the basis of pre-IIRIRA guilty plea would raise a "profound constitutional question." *Ibid.* The court remarked that "the Constitution's safeguard against retroactivity is especially appropriate where it protects an unpopular group or individual" (presumably referring to aliens). *Ibid.*

tive," and "may alter the requirements for continued residence in this country." App. 33a-34a. He then found it "clear on the face of the statute" that Congress had repealed Section 1182(c) relief for aliens placed in removal proceedings after IIRIRA took effect. App. 34a. Stressing IIRIRA's "comprehensive method of implementation" and Congress's intent that it be "a complete break from the past," he concluded that "Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997." App. 34a-35a. The majority's contrary ruling, Judge Walker submitted, created an "awkward statutory patchwork" (App. 37a) because it gave respondent "access to a waiver of deportation hearing under [Section 1182(c)] that was part and parcel of a statutory scheme that no longer exists" (*ibid.*). He also concluded that applying Section 304 to respondent's case would not conflict with the presumption against retroactivity because Section 304 "is not made retroactive merely because it applies to convictions for aggravated felonies before that time. The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief." App. 39a. Judge Walker further stated (*ibid.*) that, even if the temporal scope of Section 304 were ambiguous, he would defer to the BIA's construction of it under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided two issues of broad significance for the administration of the Nation's immigration laws. First, it has concluded that criminal aliens found removable because of an aggravated felony conviction in proceedings commenced under IIRIRA may invoke the habeas corpus jurisdiction of the district courts under 28 U.S.C. 2241 to challenge the merits of their removal orders on constitutional and statutory grounds. That decision conflicts directly with the decisions of two other courts of

appeals. The decision also cannot be squared with the structure of judicial review of removal orders that Congress has enacted, and could lead to significant delays in the removal of criminal aliens from the United States, despite Congress's particular concern that removal of criminal aliens be expedited. Resolution of the proper forum for challenges to removal orders is profoundly important to the orderly administration of the Nation's immigration laws after IIRIRA.

Second, the court of appeals has concluded that aliens convicted of aggravated felonies before AEDPA and IIRIRA were enacted but placed in removal proceedings after IIRIRA took effect may still obtain relief from removal under old 8 U.S.C. 1182(c) (1994)—even though Section 1182(c) was *repealed* by IIRIRA when IIRIRA took effect. That decision is manifestly wrong. It proceeds from a misunderstanding of IIRIRA Section 304, which comprehensively replaced the old system of deportation, including proceedings for discretionary relief, with a wholly new system of removal, with its own, different eligibility criteria for discretionary cancellation of removal. It also relies on a misapprehension of the presumption against retroactive application of federal statutes, which has no operation in this removal context. And the decision cannot be squared with other appellate decisions recognizing that former Section 1182(c) no longer applies in removal proceedings under IIRIRA. The court of appeals' reading of IIRIRA Section 304, if not reversed, could affect the removal proceedings of many criminal aliens who were convicted of criminal offenses before AEDPA and IIRIRA were enacted but who have not yet been charged with removal because they have not completed their prison terms.

1. a. The court of appeals' central jurisdictional ruling in this case and in *Calcano*[13] is that a criminal alien who is precluded from obtaining judicial review of his removal order in the court of appeals because of 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) may nontheless obtain judicial review by filing a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. App. 6a. That holding conflicts directly with the decisions of two other courts of appeals, as the court below acknowledged in *Calcano* (see App. 57a-59a).[14] In *Max-George* v. *Reno*, 205 F.3d 194 (2000), petition for cert. pending, No. 00-6280, the Fifth Circuit, upholding the dismissal of an alien's habeas corpus petition filed in district court, held that "IIRIRA eliminates § 2241 jurisdiction" for aggravated felons seeking to challenge their removal orders, and that "[t]he clear language of IIRIRA's permanent rules force[s] an alien to raise all potential issues regarding his deportation at one place and time: a petition for review filed in the court of appeals." 205 F.3d at 198; see *id.* at 199 ("IIRIRA's permanent provisions eliminate § 2241

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[13] Because the court of appeals dismissed the aliens' petitions for review in *Calcano* and the government was therefore nominally the prevailing party in that case, we have not sought review of that decision in this Court. The court's reasoning in *Calcano*, however, was the basis for a decision adverse to the government in this case.

[14] The Second Circuit's decision is consistent, however, with decisions of the First, Third, and Ninth Circuits. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 over similar "retroactivity" challenge); *Liang* v. *INS*, 206 F.3d 308, 315-323 (3d Cir. 2000) (holding that, because of Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar "retroactivity" claim, but that district court had jurisdiction to entertain the claim on habeas corpus); *Flores-Miramontes* v. *INS*, 212 F.2d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, because of Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

habeas corpus jurisdiction for those cases that fall within § 1252(a)(2)(C).").[15] Similarly, in *Richardson* v. *Reno*, 180 F.3d 1311 (1999), cert. denied, 120 S. Ct. 1529 (2000), the Eleventh Circuit held (*id.* at 1315) that "IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings," and that IIRIRA "constitute[s] a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders, removal proceedings, and detention pending removal."[16] Certiorari is warranted to resolve this important jurisdictional issue, which potentially affects thousands of criminal aliens who may seek to file petitions for review or for habeas corpus to challenge their removal orders. Those aliens, the government, and the courts should know definitively whether aliens may challenge their removal orders in district court under Section 2241, or whether they must present any challenges only in the court of appeals.

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[15] The Fifth Circuit has relied on its decision in *Max-George* in subsequent cases to order the dismissal of habeas corpus petitions brought by aliens in district court. See *Perez* v. *Reno*, 227 F.3d 294 (2000); *Garnica-Vasquez* v. *Reno*, 210 F.3d 558 (2000); *Finlay* v. *INS*, 210 F.3d 556 (2000).

[16] As we pointed out in our brief in opposition (at 21-23) in *Richardson*, that case did not actually involve an alien's challenge to a final removal order, but rather involved an alien's challenge to his detention pending the BIA's final decision in his removal proceeding. The *Richardson* court's conclusion that IIRIRA had precluded habeas corpus jurisdiction over challenges to final removal orders was, however, a necessary predicate for its conclusion that it also lacked jurisdiction over challenges to detention pending the final removal decision. See 180 F.3d at 1314-1317. In addition, the Eleventh Circuit has since relied on its decision in *Richardson* to conclude that a district court lacked habeas corpus jurisdiction over an aggravated felon's challenge to his final removal order. See *Russell* v. *Reno*, No. 99-10084 (11th Cir. May 9, 2000), slip op. 2 (per curiam), petition for cert. pending, No. 00-5970; see also *Alanis-Bustamante* v. *Reno*, 201 F.3d 1303, 1307 (11th Cir. 2000) (stating that, "under the permanent provisions of IIRIRA, § 2241 habeas jurisdiction over removal cases no longer exists") (footnote omitted).

b. The court of appeals' jurisdictional ruling is fundamentally at odds with the basic framework of Congress's legislation for judicial review of removal orders. Since 1961, Congress has consistently provided that such review should proceed only in the courts of appeals, in order to prevent delays in deportations.[17] Although Congress had also expressly provided, in old Section 1105a(a)(10), that aliens actually held in custody could obtain limited judicial review by habeas corpus, Congress repealed even that provision in Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS." 110 Stat. 1268. That repeal divested the district courts of authority to review the merits of final deportation orders on habeas corpus, and made the courts of appeals the exclusive forum for all challenges to deportation orders.

In IIRIRA, Congress confirmed that all judicial review of removal orders must be had in the courts of appeals. In Section 1252(a)(1), Congress provided that "[j]udicial review of a final order of removal * * * is governed only by" the Hobbs Act, 28 U.S.C. 2341-2351, which channels review of agency orders into the courts of appeals. Congress did not

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[17] In 1961, Congress enacted 8 U.S.C. 1105a(a), which provided that the court of appeals review procedures of the Hobbs Act "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." Congress enacted Section 1105a(a) because it was dissatisfied with the bifurcated system of review that resulted from this Court's decisions in *Heikkila* v. *Barber*, 345 U.S. 229 (1953), and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), permitting aliens to proceed in district court. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22, 27-28 (1961). As this Court observed in *Foti* v. *INS*, 375 U.S. 217, 224 (1963), "[t]he fundamental purpose behind [placing exclusive review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts". See also *Stone* v. *INS*, 514 U.S. 386, 399 (1995).

provide any general exception for habeas corpus review at the behest of aliens held in custody, as it had provided before AEDPA in former 8 U.S.C. 1105a(a)(10) (1994). Significantly, moreover, Section 1252(a)(1) contains an express exception from its general provision for exclusive review in the courts of appeals only for "an order of removal without a hearing pursuant to" 8 U.S.C. 1225(b)(1) (Supp. IV 1998). For cases covered by that exception, Section 1252(e)(2) provides that "[j]udicial review of any determination made under [Section 1225(b)(1)] is available in habeas corpus proceedings." Thus, when Congress intended in IIRIRA to provide for judicial review of final removal orders in habeas corpus proceedings in district court, it expressly so provided in Section 1252 itself. Congress's omission of any provision for habeas corpus review of any other kind of removal order necessarily means that such review is barred. See *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1987); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Furthermore, to ensure that the specified procedures for judicial review in Section 1252 would not be circumvented, Congress enacted Section 1252(b)(9), which provides sweepingly: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252 itself]." Section 1252(b)(9) confirms that, except for the narrow circumstance, expressly mentioned in Section 1252(a)(1) itself, where Congress permitted habeas corpus review, the court of appeals review procedures of Section 1252 are the exclusive ones available to aliens seeking to challenge their removal orders. Indeed, this Court described Section 1252(b)(9) in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471, 483 (1999), as an "unmis-

takable 'zipper' clause" that channels judicial review to the courts of appeals.

Finally, Congress also restricted, to a considerable degree, judicial review of criminal aliens' removal orders. Section 1252(a)(2)(C) provides that, "[n]otwithstanding any other provision of law"—broad language not limited to Section 1252 or even the INA—"no court shall have jurisdiction to review any final order of removal against" an aggravated felon. The court of appeals' ruling that respondent could obtain review in the district court of the final order of removal against him is flatly inconsistent with that ban.

These consistent and successive enactments show that Congress has required that judicial review of deportation orders be had, if at all, only in the courts of appeals. The court of appeals in this case, however, concluded that Congress has not acted with sufficient clarity to prevent aliens from challenging their removal orders in the district courts under Section 2241. The result of the court of appeals' decision is that *criminal* aliens may proceed in district court under Section 2241 to test the validity of their removal orders, whereas all other aliens must file petitions for review in the court of appeals, pursuant to the traditional exclusive-review procedures. That result not only frustrates Congress's intent that review of criminal aliens' deportation proceedings be streamlined and limited; it turns Congress's scheme on its head—as the court of appeals acknowledged in *Calcano*. See App. 72a (agreeing that government's reading "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review"). It is scarcely conceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and delay) of their removal orders than all other aliens. Cf. *Foti* v. *INS*, 375 U.S. 217, 224 (1963) (noting

Congress's concern with delays in judicial review of removal orders); *Stone* v. *INS*, 514 U.S. 386, 399 (1995) (similar).[18]

c. The court of appeals' jurisdictional decision also proceeds from a misplaced reliance on two canons of statutory interpretation. First, invoking this Court's decisions in *Felker* and *Yerger*, holding that implied repeals of habeas corpus jurisdiction are not favored, the court stated in *Calcano* that it could not "presume" that Congress had divested district courts of their authority to review removal orders given that Congress had not "explicitly mention[ed] the jurisdictional statute [28 U.S.C. 2241] or the general type of jurisdiction by name." App. 61a; see App. 62a-63a (stressing that IIRIRA "do[es] not explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241").

This case, however, does not involve an assertion of "implied" repeal of habeas corpus jurisdiction. In AEDPA Section 401(e), Congress *expressly* repealed the INA's prior provision for habeas corpus review in 8 U.S.C. 1105a(a)(10) (1994). See p. 4, *supra*. In IIRIRA, Congress also *expressly* provided that judicial review of a final removal order may be had "only" in the court of appeals, subject only to a narrow exception allowing judicial review in habeas corpus proceedings for a confined set of cases that does not encompass this case. See pp. 21-22, *supra*. Neither *Felker* nor *Yerger* intimates, much less holds, that such statutory provisions are

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[18] Aliens proceeding in district court pursuant to Section 2241 have markedly greater opportunities for delay than those proceeding directly in the courts of appeals. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits governing the exclusive-review procedures of the INA, see 8 U.S.C. 1252(b)(1) (Supp. IV 1998). Also, unlike the INA, Section 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. IV 1998). And, of course, an alien who is unsuccessful in district court can appeal to the court of appeals, and thereby obtain further delay.

ineffective to bar review on habeas corpus, and that the only way in which Congress can divest the district courts of authority under Section 2241 is by referring to that specific statute or using the words "habeas corpus" in an enactment. Rather, if Congress's intent is clear that another statutory scheme provides the exclusive means by which an alien's removal order may be tested, the courts must give effect to that determination. Here, the entire, self-contained structure of judicial review that Congress has erected in Section 1252—requiring that judicial review of removal orders be governed "only" by the court of appeals review procedures (Section 1252(a)(1)); precluding judicial review of aggravated felons' removal orders "[n]otwithstanding any other provision of law" (Section 1252(a)(2)(C)); dictating that judicial review of all legal and factual issues arising in removal proceedings be had "only" under Section 1252 itself (Section 1252(b)(9)); and creating an express but very narrow provision for certain habeas corpus proceedings (pp. 21-22, *supra*)—demonstrates that a removal order may be challenged only in the courts of appeals under Section 1252, and not also in the district courts under Section 2241.

The court of appeals also perceived a need to avoid a serious constitutional question that would supposedly arise under the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, if no federal court had authority to consider respondent's particular challenge to his removal order. See App. 68a. We agree with the court of appeals that Section 1252(a)(2)(C) bars it from entertaining the claim advanced by respondent in this case, namely, that the repeal of old Section 1182(c) does not apply to his case. Nor, as we have explained, could that claim be presented to the district court. The withdrawal of the courts' authority to hear that particular claim, however, raises no constitutional concerns, for that claim does not fall within the scope of the habeas corpus remedy preserved by the Suspension Clause. Respondent has not

contended that the Attorney General lacks authority to remove him, nor has he contested that he was properly found removable based on his aggravated felony conviction. Rather, he argues that the BIA erred in concluding that it could not grant him discretionary relief from a concededly proper removal.

This Court has never held that such a claim of error is within the constitutional core of the Great Writ that must be preserved under the Suspension Clause. To the contrary, the Court has described the Attorney General's discretionary power to grant a dispensation from deportation as an "act of grace," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yang*, 519 U.S. 26, 30 (1996); see also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). The court of appeals therefore erred in suggesting that the Suspension Clause would be violated if respondent is not afforded a judicial forum for review of his claim, and its misplaced concern should not have led it to conclude that Section 2241 remains available as a vehicle for presentation of that claim.

2. a. Certiorari is also warranted to review the court of appeals' decision on the merits that aliens who pleaded guilty to aggravated felonies before AEDPA's enactment, but were placed in removal proceedings under IIRIRA, remain eligible for discretionary relief from deportation under the repealed Section 1182(c). That ruling represents a manifestly erroneous application of both steps of the *Landgraf* test for determining the temporal reach of a federal statute. It also conflicts with this Court's settled jurisprudence that Congress may alter the bases on which aliens are to be removed without implicating constitutional retroactivity concerns.

First, under the first *Landgraf* step, Congress has clearly prescribed that old Section 1182(c) has no application in any removal proceeding commenced on or after April 1, 1997. In

Section 304 of IIRIRA, Congress comprehensively revised the INA: it eliminated the INA's old "deportation" and "exclusion" proceedings; it repealed Section 1182(c), which was applicable in such proceedings; it created a new "removal" proceeding; and it created a new form of discretionary relief (cancellation of removal). IIRIRA also established the same effective date for *all* of those changes made by Section 304, which are plainly to be taken as a whole. See IIRIRA § 309(a), 110 Stat. 3009-625. IIRIRA's effective date thus marks a caesura, after which a new statutory framework is to be applied. The court of appeals' decision, however, creates a hybrid form of proceeding, in which aliens who concededly are properly placed in *removal* proceedings under the new statutory provisions enacted by IIRIRA Section 304 may nonetheless apply for relief from *deportation*, despite IIRIRA Section 304's repeal of that form of relief. Congress simply did not fashion any such interweaving of old and new parts of the INA.

The court of appeals also erred in concluding, under the second *Landgraf* step, that application of IIRIRA's repeal of Section 1182(c) to aliens who pleaded guilty before that repeal would contravene the presumption against retroactivity. That conclusion is contrary to this Court's longstanding understanding of deportation proceedings as inherently prospective, in that they concern the alien's ongoing right to remain here. As the Court explained in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), "[t]he deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." Similarly, in *AADC*, *supra*, the Court emphasized that, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law." 525 U.S. at 491. Thus, as Judge Walker observed in dissent below (App. 33a-34a), Congress has frequently altered the

categories of aliens who may continue to reside in the United States, and this Court has consistently upheld Congress's power to do so against constitutional objection.[19] And as Judge Walker also noted (App. 39a), even if it were not sufficiently clear under the first step of the *Landgraf* analysis that Congress had intended IIRIRA Section 304's repeal of former Section 1182(c) to apply to all new removal proceedings commenced under IIRIRA, the courts should defer to the Attorney General's definitive construction of the temporal scope of that repeal under standard principles of administrative law, see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), and the Attorney General's particular statutory charge to issue controlling constructions of the INA, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); 8 U.S.C. 1103(a)(1) (Supp. IV 1998).

b. The court of appeals' decision on the merits cannot be squared with decisions of other courts of appeals recognizing that all of IIRIRA Section 304, including its repeal of Section 1182(c), applies in all removal proceedings commenced after IIRIRA became effective. In *Morales-Ramirez* v. *Reno*, 209 F.3d 977 (7th Cir. 2000), an alien was served with a notice of exclusion proceedings before AEDPA's enactment but was not actually placed in removal proceedings until after IIRIRA's effective date; he contended that the INS violated his due process rights by proceeding against him in removal proceedings, in which he was ineligible for cancellation of removal because of his aggravated felony conviction, rather than in old exclusion proceedings, in which he could have applied for relief under old Section 1182(c). The Seventh Circuit rejected that contention, concluding that, because the

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[19] See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596 (1952); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).

INS did not file the charging document with the immigration court until after IIRIRA became effective, the alien was never placed in pre-IIRIRA exclusion proceedings (see p. 9 n.8, *supra*), and so he had "no protected interest in retaining the ability guaranteed by [Section 1182(c)] to apply for discretionary waiver of exclusion." *Id.* at 983.

Similarly, in *Galindo-Del Valle* v. *Attorney General*, 213 F.3d 594 (11th Cir. 2000), petition for cert. pending, No. 00-362, an alien convicted of an aggravated felony before AEDPA was enacted, but placed in removal proceedings after IIRIRA became effective, challenged as unconstitutional the BIA's alleged application of AEDPA Section 440(d) in his case to bar him from relief under old Section 1182(c). The court of appeals held that Galindo-Del Valle lacked standing to make that contention because "the INS did not commence proceedings against Galindo-Del Valle until after IIRIRA's permanent rules had repealed former [Section 1182(c)] in its entirety," and "AEDPA § 440(d) was not applied to Galindo-Del Valle to bar [Section 1182(c)] relief because [Section 1182(c)] had been repealed." 213 F.3d at 598. Both the Seventh and Eleventh Circuits have therefore relied on their (correct) understanding of the temporal scope of IIRIRA Section 304 to reject constitutional claims by aliens placed in post-IIRIRA removal proceedings that they should have been allowed to apply for relief under former Section 1182(c).

c. The issue of the temporal scope of IIRIRA's repeal of former Section 1182(c) is of considerable importance in the Attorney General's administration of the INA. More than 50 other aliens have already challenged their removal orders in the lower courts on grounds similar to those raised by respondent. Moreover, the impact of the court of appeals' decision is potentially enormous. We have been informed by the Executive Office for Immigration Review (EOIR), the separate entity within the Justice Department that adjudi-

cates immigration cases, that in just the first year after IIRIRA became effective, EOIR decided about 13,000 removal cases involving aliens convicted of aggravated felonies. Many of those aliens were likely convicted before AEDPA was enacted. Now they—along with thousands of other criminal aliens who have been or in the future will be placed in removal proceedings—may seek to challenge their removal orders on the ground that they should have been allowed to apply for relief under former Section 1182(c). Accordingly, if the Court concludes that the district court properly exercised habeas corpus jurisdiction over respondent's challenge to his removal order, the Court should definitively resolve whether relief remains available under former Section 1182(c) to aliens such as respondent who were placed in removal proceedings after IIRIRA Section 304 became effective, notwithstanding Congress's express repeal of Section 1182(c) upon the effective date of IIRIRA's new removal procedures.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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